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No. 616

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

G. S. SINCLAIR, et al.,

Plaintiffs and Petitioners,

vs.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

PETITION FOR REHEARING

PHILL SILVER
1680 North Vine Street
Hollywood 28, California

Attorney for Petitioners.

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The appellants, G. S. Sinclair, et al, respectfully petition this Honorable Court for a rehearing of the petition for Certiorari in the above entitled cause and in support of this

petition represent to the Court as follows:

1. Heretofore the appellants filed a petition for a Writ of Certiorari with this Court. Thereafter the respondents, on January 20th, filed a brief in opposition to the granting of the petition. On February 19, 1962, the Court denied the petition for Certiorari.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

The respondents have misconstrued petitioners' theory of its case and have perhaps misled the United States Supreme Court into denying the petition for Certiorari.

Respondent in its brief in opposition to the Petition for a Writ of Certiorari argues that the questions of whether or not to make a given public improvement, what plan should be used and the location of that improvement are clearly political, do not require a hearing and are not the subject of judicial inquiry. Numerous cases are cited, none of which are in point.

Petitioners do not dispute the law generally applicable to a resolution of necessity in eminent domain cases. In none of the United States Supreme Court cases cited by respondent was the issue herein raised passed upon by the respective courts, to-wit: that arbitrary action of a highway commission in the selection of a public highway is subject to judicial review for arbitrariness or abuse of discretion.

The decision of the California Supreme Court in People v. Chevalier, 52 Cal. 2d 299, is in disagreement with the courts of last resort of the overwhelming majority of the states. By denying recourse to the courts to review "ARBITRARY" action of an administration, the California Supreme Court has in effect prevented the protective application of the due process clause of the Fourteenth Amendment.

Basing its decision on a restricted interpretation of the Rindge case, 262 U. S 700, the California Supreme Court has drawn conclusions beyond the intended scope of the decision. The court there said.

> "The ranch owners were not prejudiced by the action of the trial court in striking out their special defenses in this behalf, since, under the general issues, they were entitled, as held by the District Court of Appeal, and were in fact permitted, to introduce all their evidence bearing upon this question."

Among the grounds urged by the petitioner for a hearing before this Court was a group of cases declaring actions of state courts denying litigants the opportunity to present their cases as constituting a violation of the due process clause of the Fourteenth Amendment.

Consistent with these cases are numerous decisions of this Court declaring that the constitutionality of a statute should not be decided on a demurrer. Typical of these cases are the following.

Borden's Farm Products v. Baldwin, 293 U. S. 194, where an appeal was taken from a decree of the District Court which dismissed on a motion equivalent to a demurrer a suit brought by the Borden Company to enjoin enforcement of a statute. In concurring, Justice Stone and Justice Cardoza stated:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer. "

In Polk v. Glover, 305 U. S. 5, an appeal was taken from a decree of a district court dismissing a suit to enjoin enforcement of a statute. In reversing, the United States Supreme Court said:

> "We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. * * * The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. * * * And that determination requires a hearing in due course upon the issues raised by the pleadings. "

This was similarly recognized in Brock v. Superior Court, 12 Cal. 2d 605, 613, where the Supreme Court of California said:

> "Also a broad principle underlying the construction of statutes which, it is charged, deprive one of constitutional rights compels a trial of the issues presented by the plaintiff's complaint. One who attacks a statute upon that ground has the burden of showing that his rights have been invaded by the actual or threatened application of the challenged law to him. 'But where the legislative action is suitably challenged' said the Supreme Court of the United States in a recent case, 'and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and findings'. "

The California Supreme Court citing Borden's Farm Products Co. v. Baldwin, 293 U. S. 194; Chastletown Corp. v. Sinclair, 264 U. S. 543; Hammond v. Schappi Bus Lines, 275 U. S. 164; Liverpool v. Integration Commissioners, 113 U. S. 33; Chicago v. Tompkins, 176 U. S. 167; Lincoln v. Lincoln, 223 U. S. 349.

The California District Court of Appeal in Masque Theatre Corporation v. City of Los Angeles, 170 Cal. App. 2d 310, similarly reversed a decision of a lower court which had

passed upon the constitutionality of an ordinance on a hearing of a demurrer. In that case an action was brought for declaratory relief for an adjudication of the right to exhibit a certain motion picture which the defendants allegedly claimed would be in violation of certain provisions of a Los Angeles City ordinance.

Quoting from the case of Burton v. United States, 196 U. S. 283, 295, the Appellate Court said:

> "Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case; * * * only an adjudication on the merits can provide the concrete factual setting that sharpened the deliberative process especially demanded for constitutional decision."

See also dissenting opinions in the following cases:

Zorach v. Clauson, 343 U. S. 306, 322;

Hurt and Sons v. Dumond, 336 U. S. 525, 574;

Nippert v. Richmond, 326 U. S. 416, 437.

The questions presented in this case are not entirely free from doubt. Whether the issue of arbitrariness can be raised in cases involving the taking of land by eminent domain was left open in United States v. Carmack, 329 U. S. 230.

The present case, however, does not involve the constitutionality of a resolution of necessity in an eminent domain case It does involve the constitutionality of the preliminary action of a highway commission in selecting a route.

Typical, perhaps, and more appropriately parallel to the issues in the present case is Currie v. Glasscock County, 179 S. W 1095 (Court of Appeal, Texas, 1915) In that case a petition was filed asking that a writ of injunction issue against Glasscock County, its county judge and the members of the Commissioner's Court restraining them from opening, laying out and establishing a first class 60-foot public road through certain enclosed lands.

The plaintiff there alleged:

> "That said jury of view which so laid out said road made no effort whatever to lay same out along the most direct and practicable route to the said eastern line of said county; on the other hand, said body fraudulently and with the deliberate intent of running said road through the land of plaintiff and her children, when they well knew that said route was not the most direct and practicable route, but that such route would run practically due east, arbitrarily laid said road and they did to make it connect with a prior road in Sterling County, Tex., which was not laid out in the most direct and practicable route to the western boundary line of Sterling County

and in the direction of the county seat of said Glasscock County, but had been arbitrarily and fraudulently for the purpose of missing certain favorite pastures, diverted in a southwesterly direction when it should have run practically due west.

"That such running of said road in Glasscock County constitutes the grossest sort of abuse of the powers conferred upon said jury of view, and, instead of being in compliance with, was in violation, not only of the order of the court appointing them, but also with both the letter and spirit of the law."

The court said,

"The first question is: Is the alleged action of the commissioner's court subject to review by the District Court, or, as contended by appellee, is it simply an act within the discretionary powers of the commisser's court, therefore not subject to be reviewed?"

In reversing the judgment which followed the sustaining of demurrers to plaintiff's petition, the Appellate Court said:

"It is well established by the decisions of our courts that the district courts through their equitable jurisdiction, have the power to review and revise the exercise of the discretion vested in the commissioner's court, in cases of

this kind, where it is shown that such courts have grossly abused the discretion vested in them."

CONCLUSION

It is respectfully submitted that important questions of constitutional law have been raised in this case which should not have been determined upon demurrer. If the petitioners had failed to appropriately allege the allegations of arbitrariness, they should have been given opportunity to amend. Additionally, in the light of the cases mentioned above, they should have been granted the opportunity to present the evidence in support of the allegations of abuse of discretion and arbitrariness so pleaded.

It is respectfully submitted that a rehearing of the denial of the petition for Certiorari should be granted so that this Court may consider the petition filed herein after full briefs.

Phill Silver

PHILL SILVER, Attorney
for Petitioners

The undersigned, Phill Silver, Attorney for Petitioners, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 33, as amended, and said petition for rehearing is not interposed for delay.

Phill Silver

PHILL SILVER, Attorney
for Petitioners